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IN THE SUPREME COURT OF THE STATE OF IDAHO

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|-----------------------|---|---------------------|
| STATE OF IDAHO, |) | |
| |) | No. 47464-2019 |
| Plaintiff-Respondent, |) | |
| |) | Ada County Case No. |
| v. |) | CR01-19-20439 |
| |) | |
| GEORGE SUNDER SILVA, |) | |
| |) | RESPONDENT’S BRIEF |
| Defendant-Appellant. |) | |
| _____ |) | |

Issue

Has Silva failed to establish that the district court abused its discretion by imposing a sentence of seven years, with two years fixed, for burglary?

Silva Has Failed To Establish That The District Court Abused Its Sentencing Discretion

According to Silva’s mother, Georgia, not long after she and her husband bailed Silva out of jail, Silva texted her, asking if he could go to her house. (PSI, p.62.¹) When Silva would not

¹ PSI page numbers correspond with the page numbers of the electronic file “Confidential Exhibits Appeal 47769-2020.pdf.” All documents in that electronic file will be identified as “PSI.”

tell Georgia why he wanted to go to her house, she “was concerned he was going to ask for money or to move back in.” (Id.) While Georgia watched her driveway from her bedroom, Silva drove his truck into the driveway and went to the front door and knocked. (Id.) Georgia heard the knocking, but “decided to not answer the door because [Silva] had acted crazy in the past.” (Id.) Georgia then heard “a loud crash of glass breaking,” so she ran out the back door and went to her neighbor’s house, fearful that Silva was looking for her. (Id.)

Ada County Deputy Sheriff Brandon Austin drove to the scene in response to Georgia’s police call. On his way, Deputy Austin saw a truck matching Georgia’s description of Silva’s truck, and, with the assistance of another officer in a separate patrol car, attempted to stop him. (PSI, pp.3, 61.) However, Silva ignored the patrol car’s emergency lights, and drove away. (PSI, p.61.) The officers chased Silva in their patrol cars, and were able to block his truck and take him into custody. (Id.) Deputy Austin met Georgia at her house and they noticed there were “several baby gates [that] had been knocked down[,] a doll house had been damaged down the hallway, spreading broken pieces from one end of the house to the other[,]” and a DVD player had been taken from the living room. (PSI, p.62.) Deputy Austin found a 6” x 4” rock laying on the floor and a shattered glass entry door. (Id.)

The state charged Silva with burglary, petit theft, eluding a peace officer, and malicious injury to property. (R., pp.29-30.) Pursuant to a plea agreement, Silva pled guilty to burglary and the remaining charges were dismissed. (R., pp.42-43; see generally Tr., p.4, L.1 - p.18, L.7.) The district court imposed a sentence of seven years, with two years fixed, for burglary. (R., pp.46-48.) The court denied Silva’s Rule 35 Motion for Reduction of Sentence. (R., pp.53, 58-59.) Silva filed a timely notice of appeal from the Judgment and Commitment. (R., pp.49-51.)

Silva asserts his sentence for burglary is excessive in light of his need to stay on medication for bipolar disorder, his acceptance of responsibility, his remorse for frightening his mother, the support of his family, and because “this was an isolated family incident.” (Appellant’s brief, pp.3-4.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant’s probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id.

“A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary ‘to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the given case.’” Id. (quoting State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982)). The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed

by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for burglary is 10 years. I.C. § 18-1403. The district court imposed a sentence of seven years, with two years fixed, which falls within the statutory guidelines. (R., pp.46-48.) Furthermore, Silva’s sentence is appropriate in light of the offense and the continued danger he presents to the community.

This is Silva’s fourth adult felony conviction. He was convicted of felony injury to a child in 2005. (PSI, p.4.) According to a Forensic Neuropsychological Examination conducted by Dr. Craig Beaver in 2013, Silva reported that “[h]e had a six-month-old daughter who was not breathing right.” (PSI, p.115.) When he took her to the hospital, it was found that she had fractured ribs – Silva admitted to Dr. Beaver that “he had fractured the ribs[,]” noting that both he and the mother “had some anger issues.” (Id.) In 2013, Silva was convicted of aggravated assault (with a deadly weapon or instrument)) and possession of a controlled substance with intent to deliver. (PSI, pp.5-6.) According to a 2013 Presentence Report, when a door-to-door salesman knocked on the door of Silva’s house, Silva answered and “‘immediately’ pointed a pistol at [the salesman’s] head[,]” yelling and cursing at him. (PSI, p.67.) When the salesman began to walk away, Silva “grabbed him by his jacket, spun him around, and pointed the gun at him again.” (Id.) Silva went back into his house when the salesman’s co-worker came around the corner of the driveway.” (Id.) According to the current Presentence Report, in addition to Silva’s adult felony convictions, he was convicted of malicious injury to property (misdemeanor) as a juvenile in 2003, possession of a controlled substance as a juvenile in 2004, and driving under the influence in 2019. (PSI, pp.4-6.) In sum, Silva has a significant criminal history, which includes two crimes of violence.

On appeal, Silva adopts his trial counsel's argument, asserting that his criminality is directly related to whether he stays on his medication for bipolar disorder. (Appellant's brief, p.3.) The district court acknowledged that dynamic, explaining that Silva suffers from bipolar disorder, some borderline personality features, and some executive functioning deficits, and "[w]hen he is off his medications, he has a tendency to hallucinate and unfortunately has a tendency to go off against people and present serious risk of harm to others." (Tr., p.35, L.18 – p.36, L.3.) Silva further contends he would be more likely to take his medications if placed on probation, stating, "Mr. Silva's need to stay on medication is simply not going to be addressed through a period of prison. There's no real incentive or motivation for Mr. Silva to take mental health medications. There is really not a mechanism for the average folks to have to be required to take those." (Appellant's brief, p.3 (quoting Tr., p.30, Ls.17-24).)

Apart from Silva's unsupported assertion that his bipolar condition "is simply not going to be addressed through a period of prison," the district court determined that the need to protect society, combined with Silva's lack of interest in receiving treatment, necessitated his imprisonment. The court explained.

Going all the way back, there are consistent strains of severe anger problems all through this record. They [sic] are also consistent threads of substance abuse and an unwillingness to stay on the medications that are helpful to him.

....

. . . The problem is when he is off his medications, he is really violent towards others.

There are serious concerns about him and the anger problems that he is [sic] consistently had through many, many years of being in the court system. And I think he presents as [a] serious risk to the public.

....

[T]he problem for me is that I have a significant improvement pattern of somebody who is assaultive and violent towards other people when he is not on his medications who also has a proven and unfortunately established pattern of not staying on his medications.

So what would help him reduce his risk is something he is not willing to do,^[2] and that is of concern to me because I can't see a practical way how we can manage this same [sic] way in the community. And sometimes what it comes down to is I don't see any practical method to monitor this in the community in a way that keeps people safe.

I'm willing to try things, but not at the risk of the safety to other people because physical safety, safety in your own home, freedom from violence, those are essential needs and rights frankly that everybody has is to be free from threats.

So I do – I think the presentence investigator is correct. This is going to have to be addressed in a control environment.

(Tr., p.36, L.4 – p.39, L.11.) The court reasonably focused on the primary sentencing consideration – protecting society – in determining that Silva should address his mental health issues in a controlled environment before going back into the community.³

² According to his GAIN-1 Recommendation and Referral Summary (G-RRS), the evaluator discussed “current emotional, behavioral, or cognitive problems” with Silva “to review the need for mental health services, barriers to accessing them, and any accommodations needed to participate in treatment.” (PSI, p.22.) “Silva’s responses indicate no/minimal motivation for treatment, which suggests that motivational problems are of high clinical significance for treatment planning, and moderate barriers/peer resistance to treatment.” (PSI, p.22.) Under the heading “psychosocial risk factors,” the evaluator stated that Silva’s “responses indicate no/minimal motivation for treatment.” (PSI, p.30.)

³ Silva’s LSI-R (“Level of Service Inventory-Revised”) evaluation rated him as a “moderate risk” to reoffend. (PSI, p.13.) The presentence investigator concluded:

Based on the findings of this investigation, Mr. Silva may benefit from continued treatment and program opportunities in a controlled environment. It is of significant concern he does not see his actions as harmful or wrong since the victim is his mother. Furthermore, it does not appear he has applied any lessons learned from his previous term of IDOC probation supervision.

(PSI, p.15.)

The district court considered the nature of Silva's crime. The court explained that Silva ignored his mother's request that he not go to her house, but instead, "he comes over, and he throws a brick through the door and comes in. She flees out the back because she's afraid and, based on the description of the police officer, she's shaking and crying. She is genuinely afraid, and he trashes her stuff for no particular reason." (Tr., p.36, L.22 – p.37, L.4.)

The court also explained that Silva's "attitude about the offense is troubling because he is basically saying, well, it's the house he grew up in, so it's his house too. But he's not free as an adult to enter into his parents' homes without their invitation." (Tr., p.36, Ls.15-19.) By attempting to minimize the seriousness of his crime, Silva undercut the mitigating effect his statements of responsibility and remorse may have otherwise had. Silva's argument that he "was not out burglarizing random houses; rather, this was an isolated family incident that did not indicate that Mr. Silva was dangerous to the community" (Appellant's brief, p.4) is not well-taken. It implies that family members – such as Silva's mother and/or his six-month old daughter – are not part of the "community" that merits protection. Such an exception is not supported in law or reason.

Finally, Silva had the general support of his mother at the time of the sentencing hearing. However, she was not willing to have in-person contact with him, as the state sought, presumably at her request, a no-contact order "for the maximum time possible," with the caveat that she "would welcome written contact and/or telephone contact." (Tr., p.21, Ls. 9-13.) Silva's father said that he "loves and supports his son," but if he is not on his medication, he does not want to be around him. (PSI, p.7.) No relevant information was gleaned from Silva's siblings. (Id.) Certainly, the general support of Silva's parents is a positive factor. However, their support does not override

the importance of protecting society – including them – by requiring Silva to successfully address his mental health issues while in confinement.

Silva has failed to show any abuse in the district court sentencing discretion.

Conclusion

The state respectfully requests this Court to affirm Silva’s conviction and sentence.

DATED this 19th day of October, 2020.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of October, 2020, served a true and correct copy of the foregoing RESPONDENT’S BRIEF to the attorney listed below by means of iCourt File and Serve:

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/s/ John C. McKinney
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JCM/dd